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QUASI-CONTRACTUAL RELIEF UNDER EXECUTORY ULTRA VIRES CONTRACTS. — In no jurisdiction in this country will a fully executed transaction be disturbed on the ground of *ultra vires*.[1] The courts are likewise unanimous in refusing relief on an *ultra vires* contract which remains wholly executory.[2] But where the contract has been fully performed on one side and benefits have been received on the other, there is a square division of authority.[3] Many jurisdictions follow New York in allowing suit on the contract.[4] Others, adopting the federal rule, refuse any recovery upon the contract, the ground of objection being "not merely that the corporation ought not to have made it, but that it could not make it."[5] Yet even in such jurisdictions a plaintiff who has performed in full, or even in part, is not wholly without relief. He may bring a bill in equity for rescission and restoration *in statu quo*.[6] And it is also settled that he may, in an action

[1] National Bank *v.* Matthews, 98 U. S. 621; Parish *v.* Wheeler, 22 N. Y. 494, 508. See 18 HARV. L. REV. 461.

[2] Safety, etc. Cable Co. *v.* Mayor, etc. of Baltimore, 74 Fed. 363; Nassau Bank *v.* Jones, 95 N. Y. 115. See 18 HARV. L. REV. 461. *Contra*, Harris *v.* Independence Gas Co., 76 Kans. 750.

[3] The courts have made no distinction between the case where the outsider sues the corporation and the case where the corporation is the party plaintiff against the outsider.

[4] Bath Gas Light Co. *v.* Claffy, 151 N. Y. 24; Camden & Atlantic R. R. Co. *v.* May's Landing, etc. R. R. Co., 48 N. J. L. 530.

[5] Central Transportation Co. *v.* Pullman's Palace Car Co., 139 U. S. 24; Marble Co. *v.* Harvey, 92 Tenn. 115. See 19 HARV. L. REV. 608.

[6] New Castle Northern Ry. Co. *v.* Simpson, 21 Fed. 533; Central Branch U. P. R. R. Co. *v.* W. U. Telegraph Co., 1 McCrary (U. S.) 551.

of *quantum meruit*, obtain the return of any property received, or its value. The courts expressly treat this suit as a disaffirmance of the transaction; no remedy involving recourse to the *ultra vires* contract is allowed.[8] Thus no relief is obtainable against a defendant who has received nothing of value.[9] Nor can damages caused by the non-fulfillment of the contract be recovered.[10]

On the other hand, a doctrine has been announced, apparently inconsistent with the allowance of any form of relief on an executory *ultra vires* contract. In a case where the plaintiff had fully performed and the defendant had not repudiated the transaction, the Supreme Court held that since the parties were *in pari delicto*, equity would not aid in the rescission of the contract.[11] This seems squarely contradictory to former statements by the same court that it is the legal duty of the parties to rescind.[12] Moreover, it seems irreconcilable with the granting of quasi-contractual relief in disaffirmance of the contract. As a general rule, where an executory contract is merely *malum prohibitum*, the fact that the parties are *in pari delicto* will not prevent recovery in *quantum meruit* for money or property transferred.[13] The granting of quasi-contractual relief in the case of executory *ultra vires* contracts is therefore in accordance with the ordinary principles of the law of contracts. And the refusal of relief on the ground that the parties are *in pari delicto* is thus not only in conflict with the established federal theory of recovery in *quantum meruit*, but is wholly unsupported by authority. The doctrine has not been followed, even by the federal courts.[14]

In a recent case A was indebted to the B corporation to the extent of $10,000. At the request of B, the C corporation made a loan of $12,000 to A, the repayment of which was guaranteed by B. In accordance with a previous agreement, A paid over $10,000 of this sum to B. A defaulted. On C's suing B upon the latter's guaranty, B pleaded *ultra vires*. The court allowed C to recover $10,000 in *quantum meruit*. *Citizens' Central National Bank* v. *Appleton*, 30 Sup. Ct. 364. Such a guaranty is executory: it cannot, like a conveyance or a mortgage,[15] be regarded as an

[7] Logan County Nat'l Bank *v.* Townsend, 139 U. S. 67, 74; Aldrich *v.* Chemical National Bank, 176 U. S. 618; Mallory *v.* Hanaur Oil Works, 86 Tenn. 598. See 19 HARV. L. REV. 608. *Contra*, Grand Lodge of Ala. *v.* Waddill, 36 Ala. 313.

[8] Central Transportation Co. *v.* Pullman's Palace Car Co., *supra;* Pullman's Palace Car Co. *v.* Central Transportation Co., 171 U. S. 138.

[9] Penn. R. R. Co. *v.* St. Louis, etc. R. R. Co., 118 U. S. 290; Franklin Co. *v.* Lewiston Savings Bank, 68 Me. 43.

[10] Pullman's Palace Car Co. *v.* Central Transportation Co., *supra;* Day *v.* Spiral Springs Buggy Co., 57 Mich. 146.

[11] St. Louis, etc. R. R. Co. *v.* Terre Haute, etc. R. R. Co., 145 U. S. 393. This case cannot be explained as being an executed transaction since a lease has been uniformly held to be executory in character. Thomas *v.* Railroad Co., 101 U. S. 71.

[12] Thomas *v.* Railroad Co., *supra;* Penn. R. R. Co. *v.* St. Louis, etc. R. R. Co., *supra*. It is also inconsistent with the refusal at the instance of the defendant to allow the plaintiff himself to retake the property transferred as in the case of American Union Teleg. Co. *v.* U. P. Ry. Co., 1 McCrary (U. S.) 188.

[13] Spring Co. *v.* Knowlton, 103 U. S. 49; Block *v.* Darling, 140 U. S. 234, 239. See POLLOCK, CONTRACTS, 3 Am. ed., 502, 503.

[14] McCutcheon *v.* Merz Capsule Co., 37 U. S. App. 586; Pullman's Palace Car Co. *v.* Central Transportation Co., *supra*. *Contra*, Olcott *v.* Internat'l & Gr. N. Ry. Co., 28 S. W. 728 (Tex. Civ. App.).

[15] Fritts *v.* Palmer, 132 U. S. 282 (conveyance); National Bank *v.* Matthews, *supra* (mortgage).

executed transaction. Accordingly, the jurisdictions adopting the federal rule restrict the parties, on an *ultra vires* guaranty, to quasi-contractual relief.[16] In the present case justice between the parties is accomplished, since the amount of recovery in *quantum meruit* is nearly equal to that on the contract. But in many instances quasi-contractual relief is grossly inadequate.[17] Such cases emphasize the obvious fairness of the New York rule.

COMPULSORY INCORPORATION OF BANKS AND THE FOURTEENTH AMENDMENT. — It is settled that the "liberty" protected by the Fourteenth Amendment includes liberty to choose and pursue a business or occupation.[1] But it was earlier decided that the restriction placed by that Amendment upon the general legislative power reserved by the states does not extend to prohibit legislation passed by virtue of the police power.[2] Within the limits of this power liberty may be restricted.

Interesting in this connection is a recent state decision holding constitutional a state statute which requires all persons engaged in banking to incorporate within three months. There were existing statutes regulating incorporated banks, under which at least three individuals had to unite to form a corporation. *Weed* v. *Bergh*, 124 N. W. 664 (Wis.). The business of banking is not a franchise to be granted by the state on what conditions it will, but an occupation lawful at common law.[3] It is equally well recognized, however, that it is a business which the state may regulate,[4] provided that such regulation be made in discharge of some recognized governmental function.[5] Undoubtedly banking regulations to protect the depositors from fraud are unimpeachable.[6] To this end were directed some of the existing statutes in the principal case; but some went further in seeking merely to protect the depositor from the insolvency of the bank.[7] Read in the light of these existing statutes, the apparent intent of the statute in question was to make all engaged in the business of banking subject to these regulations. The fact that banks deal in their own credit, the widespread evil results of a bank failure, and the inability of the depositors to guard against loss, are considerations sufficient to show that regulation to insure the financial stability of banks is a legitimate governmental function.[8]

Not only must the end of the legislation be legitimate, but the means adopted by it must bear some intimate relation to that end. There cannot, for instance, be prohibition of a lawful business under the guise of regula-

[16] Humboldt Mining Co. *v.* American Mfg., etc. Co., 62 Fed. 356; Norton *v.* Derby National Bank, 61 N. H. 589. See Penn. R. R. Co. *v.* St. Louis, etc. R. R. Co., *supra*.

[17] Pullman's Palace Car Co. *v.* Central Transportation Co., *supra*. *Cf.* Bissel *v.* Michigan Southern, etc. R. R. Co., 22 N. Y. 258. See 14 HARV. L. REV. 339.

[1] Allgeyer *v.* Louisiana, 165 U. S. 578. For an argument that the correct meaning is freedom from physical restraint see 4 HARV. L. REV. 365.

[2] Butchers' Union, etc. Co. *v.* Crescent City, etc. Co., 111 U. S. 746.

[3] Nance *v.* Hemphill, 1 Ala. 551.

[4] Meadowcroft *v.* People, 163 Ill. 56.

[5] *Cf.* Missouri Pacific Ry. Co. *v.* Nebraska, 164 U. S. 403.

[6] Baker *v.* State, 54 Wis. 368; Meadowcroft *v.* People, *supra*.

[7] SANBORN'S STAT. SUPP. (Wis., 1906), §§ 2024–6 to 2024–55.

[8] Blaker *v.* Hood, 53 Kan. 499; State *v.* Richcreek, 167 Ind. 217. See FREUND, POLICE POWER, § 400. *Cf.* Brady *v.* Mattern, 125 Ia. 158.